U.S. Department of Transportation
Federal Highway Administration

Memorandum

Subject: Section 4(f) Policy Paper

Date: OCT 05 1987

From: Director, Office of Environmental Policy
Washington, D.C. 20590

Reply to Attn of: HEV-11

To: Regional Federal Highway Administrators
Regions 1-10
Direct Federal Program Administrator (HDF-1)

This memorandum transmits copies of a Section 4(f) policy paper (attachment 1) which provides comprehensive guidance on the preparation of Section 4(f) evaluations. The guidance does not set forth any new policy and is merely a compendium of our current policy positions, which are based on a combination of (1) the basic requirements of the statute, (2) prevailing case law resulting from litigation, and (3) 21 years of ad hoc decisions on project-by-project application.

The policy paper is not regulatory. It provides instructional guidance on when and how to apply the provisions of Section 4(f). The Section 4(f) policy paper should be inserted in Section 24 of Volume 3 of the Environmental Guide Book. Pages 27 and 28 of Section 24 should be deleted. The Section 4(f) policy paper will also be included in the textbook for the Environmental Documents training course.

A draft of the policy paper was circulated to FHWA field offices for review and comment in June 1985. We greatly appreciate the field office input received in developing the policy paper. We coordinated the policy paper with the Office of the Secretary of Transportation and the Department of the Interior (DOI). The DOI indicated it agreed with much of the policy paper; however, there were still some areas (constructive use, wild and scenic rivers, wildlife management areas, and historic and archeological sites) where it disagrees with our interpretation and application of Section 4(f). Attachment 2 explains the differences between the FHWA and DOI positions.

Ali F. Sevin

2 Attachments

U.S Department
of Transportation

Federal Highway Administration

400 Seventh St. S.W.
Washington, D.C. 20590

OCT 5 1987

In Reply Refer To:
HEV-11

Mr. Bruce Blanchard
Director, Office of Environmental
Project Review
U.S. Department of the Interior
Washington, D.C. 20240

Dear Mr. Blanchard:

Thank you for your constructive comments on our Section 4(f) Policy Paper. We have revised the policy paper (copy enclosed) to incorporate most of your comments. However, there are some major areas (constructive use, public parks and recreation areas, historic sites, archeological sites, late designation, wild and scenic rivers, joint development, and wildlife management areas) where we still disagree. The following is a summary of these areas.

Constructive Use - You stated you might consider the following as examples of constructive use: (1) where the proximity of a highway alters a habitat area in a wildlife refuge or interferes with the normal behavior of wildlife populations; (2) where a highway reduces the level of access to a park or recreation area; and (3) where a highway changes the character of the view from a historic district that is incompatible with the historic nature of the district. Your description of the threshold for constructive use of Section 4(f) resources contains terms such as alters, interferes, reduces, and changes. We agree that these types of impacts where they are sufficiently severe to substantially impair the resource would be a constructive use. However, standing alone, we view these terms as establishing a lower threshold than those generally found in case law. A number of court decisions, including Adler v. Lewis, 675 F.2d 1085 (9th Cir. 1982) (copy enclosed), have established "substantial impairment" as the threshold for constructive use.

Public Parks and Recreation Areas - You stated that public housing and military recreation areas, even if they have some restrictions on the use of them, should be protected by Section 4(f). The Section 4(f) statute applies to "publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge." We take this to mean that the land must be open to the entire public to be protected by Section 4(f). We agree with you that recreation areas associated with public housing and military bases do not need unrestricted public access to receive protection under Section 4(f). We have added a sentence to question 2.C. to clarify this point. The Federal Highway Administration strongly encourages the preservation of parks and recreation areas that are not open to the public at large. A statement to that effect has been added to the policy paper.

Historic Sites - You want to afford Section 4(f) protection to historic sites if they are not on or eligible for the National Register of Historic Places. Obviously, we cannot afford Section 4(f) protection to every site which is claimed historic by any individual. It has been a longstanding Department of Transportation Policy to apply Section 4(f) to all sites on or eligible for the National Register. In addition, our environmental regulation and this policy paper extend Section 4(f) protection to other historic sites based on an individual site-by-site review.

Archeological Sites - You want to afford Section 4(f) protection to archeological sites even if they are important chiefly because of what can be learned by data recovery and have minimal value for preservation in place. This position is contrary to our Section 4(f) regulation. This portion of our regulation was upheld in the Belmont case (Town of Belmont v. Dole, 755 F.2d 28 (1st Cir. 1985)).

Late Designation - You want to afford Section 4(f) protection to properties which are designated as significant historic sites even after acquisition for highway purposes. You base your position on a belief that such a situation would be the result of a totally inadequate effort to identify historic properties at the time of search. Our policy clearly states that, if the effort was not adequate (using the Section 106 requirements at the time of search), Section 4(f) would apply. Our policy does not seek to obtain any advantage because of inadequate resource identification, but rather to disqualify properties which did not meet the eligibility requirements at the time of search (for example, the property was not old enough).

Wild and Scenic Rivers - You stated that (1) all rivers now in the System have been designated for their recreational and park (conservation, etc.) values, (2) the primary use of all publicly owned lands within their boundaries is for Section 4(f) purposes, and (3) the officials having jurisdiction will certify that this is so if asked. We do not necessarily base application of Section 4(f) on titles or systems designation; instead, we base Section 4(f) application on actual function. If portions of the publicly owned lands are designated or function primarily for recreational purposes, then those portions would be subject to Section 4(f). We do not believe that publicly owned lands designated only for conservation values are recreational areas subject to Section 4(f).

Joint Development - You expressed a desire to apply Section 4(f) to park or recreation land reserved for highway right-of-way if the reserved land is managed and/or maintained with park or recreation funds. Section 4(f) application to publicly owned land is not based on the type of funds spent to manage or maintain that land. Public land reserved for highway right-of-way is considered highway right-of-way. Section 4(f) does not apply to either authorized or unauthorized temporary occupancy of highway right-of-way pending project development. Applying Section 4(f) to the temporary occupancy of this land would be a strong deterrent to State and local

governments to permit such activities and would encourage these areas to be fenced off. We believe that temporary occupancy of highway right-of-way (reserved for future construction) for park or recreation should be encouraged by our Section 4(f) policy, rather than discouraged.

Wildlife Management Areas (WMA) - You stated that Federal WMAs are part of the National Wildlife Refuge System and therefore are considered to be a refuge within the meaning of Section 4(f). We have revised the discussion on wildlife management areas to state that such areas would be protected by Section 4(f) where they perform the same functions as a refuge (i.e., protection of species). As explained in answer 2A, we would, of course, rely heavily on the views of the officials having jurisdiction over these areas in determining their function.

Enclosed is a copy of the Section 4(f) policy paper (along with a summary of your position). Since we included most of your comments, we felt that it would be counterproductive to send your memo intact to our field organization along with the Section 4(f) policy paper. Consequently, we summarized your position for the major areas on which we disagree. A copy is enclosed. We appreciate the assistance you have given us in finalizing our paper.

Sincerely yours,

Eugene W. Steckley, Chief
Environmental Operations Division

2 Enclosures

September 24, 1987

(Revised) JUN 7 1989

SECTION 4(f)

POLICY PAPER

Table of Contents

Section 4(f) Background

History

Section 4(f) has been part of Federal law in some form since 1966. It was enacted as Section 4(f) of the Department of Transportation (DOT) Act of 1966 (hence the reference to "Section 4(f)"). Section 4(f) was originally set forth in Title 49, United States Code (U.S.C.), Section 1653(f), and applies only to agencies within the DOT. Also, in 1966, a similar provision was added to Title 23, U.S.C., Section 138. Between 1966 and 1968, the wording in the two provisions was somewhat different. This led to some confusion since Section 4(f) applied to all programs of DOT, whereas Section 138 applied only to the Federal-Aid Highway Program. Consequently, the Federal-Aid Highway Act of 1968, amended the wording in both sections to be substantially consistent. Except for the last sentence of the second paragraph (which appears only in Section 138) the two sections read:

"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed.

After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreation area, wildlife and waterfowl refuge, or historic sites resulting from such use. In carrying out the national policy declared in this Section, the Secretary, in cooperation with the Secretary of the Interior and appropriate State and local officials, is authorized to conduct studies as to the most feasible Federal-aid routes for the movement of motor vehicular traffic through or around national parks so as to best serve the needs of the traveling public while preserving the natural beauty of these areas."

In January 1983, as part of an overall recodification of the DOT Act, Section 4(f) was amended and codified in 49 U.S.C., Section 303. The wording in Section 303 reads as follows:

(a) It is the policy of the United States Government that special effort be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) The Secretary may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, recreation area, refuge, or site) only if-

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

Section 138 was not amended, so the wording in the two sections is once again different. The legislative history of the 1983 recodification indicates that no substantive change was intended. Further, because of familiarity with Section 4(f) by thousands of Federal and State personnel, the Federal Highway Administration (FHWA) continues to refer to the requirements as Section 4(f).

The statute does not establish any procedures for preparing Section 4(f) documents, for circulating them, or for coordinating them with other agencies. The statute does not require the preparation of any written document, but the FHWA has developed procedures for the preparation, circulation, and coordination of Section 4(f) documents. The purpose of these procedures is to establish an administrative record of the basis for determining that there is no feasible and prudent alternative, and to obtain informed input from knowledgeable sources on feasible and prudent alternatives and on measures to minimize harm.

Numerous legal decisions on Section 4(f) have resulted in a DOT policy that conclusions on no feasible and prudent alternatives and on all possible planning to minimize harm must be well documented and supported. The Supreme Court in the Overton Park case (Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)) ruled that determinations on no feasible and prudent alternative must find that there are unique problems or unusual factors involved in the use of alternatives or that the cost, environmental impacts, or community disruption resulting from such alternatives reach extraordinary magnitudes.

Purpose of this Paper

Since the enactment of Section 4(f) in 1966, courts have made several interpretations of how this statute should be applied. From these court interpretations and many years of project-by-project applications, FHWA has developed numerous policy positions on various aspects of the Section 4(f)

requirements. This paper presents these various policy positions. This paper addresses only the programs and activities administered by FHWA and serves as a guide for the applicability of Section 4(f) for project situations most often encountered. For specific projects that do not completely fit the situations described in this paper, contact the Regional Office or Washington Headquarters.

Important Points

A few points should be noted at the outset. Section 4(f) applies to all historic sites, but only to publicly owned public parks, recreational areas, and wildlife and waterfowl refuges. When parks, recreational areas, and wildlife and waterfowl refuges are owned by private institutions and individuals, even if such areas are open to the public, Section 4(f) does not apply. The FHWA does, however, strongly encourage the preservation of such privately owned lands. If a governmental body has a proprietary interest in the land (such as fee ownership, drainage easement, or wetland easement), it can be considered "publicly owned."

When projects are litigated, Section 4(f) has been a frequent issue. Therefore, it is essential that the following are completely documented: (1) the applicability/nonapplicability of Section 4(f); (2) the coordination efforts with the official(s) having jurisdiction over or administering the land (relative to significance of the land, primary use of the land, mitigation measures, etc.); (3) the location and design alternatives that would avoid or minimize harm to the Section 4(f) land; and (4) all measures to minimize harm, such as design and landscaping.

There are often concurrent requirements of other Federal agencies when Section 4(f) lands are involved in highway projects. Examples include compatibility determinations for the use of lands in the National Wildlife Refuge System and the National Park System, consistency determinations for the use of public lands managed by the Bureau of Land Management, determinations of direct and adverse effects for Wild and Scenic Rivers under the jurisdiction of such agencies as the U.S. Fish and Wildlife Service, National Park Service, Bureau of Land Management, and Forest Service, and approval of land conversions covered by the Federal-aid in Fish Restoration and the Federal-Aid in Wildlife Restoration Acts (the Dingell-Johnson and Pittman-Robertson Acts), the Recreational Demonstration Projects and the Federal Property and Administrative Service (Surplus Property) Acts, and Section 6(f) of the Land and Water Conservation Fund Act. The mitigation plan developed for the project should include measures that would satisfy the requirements for these determinations and for Section 4(f) approval. When Federal lands, which are needed for highway projects are not subject to Section 4(f), there is still a need for close coordination with the Federal agency owning or administering the land in order to develop a mitigation plan that would satisfy any other requirements for a land transfer.

Section 4(f) Evaluation

When a project uses land protected by Section 4(f), a Section 4(f) evaluation must be prepared. The following information provides guidance on the key areas of a Section 4(f) evaluation.

Alternatives

The intent of the Section 4(f) statute and the policy of the Department of Transportation is to avoid public parks, recreation areas, refuges, and historic sites. In order to demonstrate that there is no feasible and prudent alternative to the use of Section 4(f) land, the evaluation must address location alternatives and design shifts that avoid the Section 4(f) land. Supporting information must demonstrate that such alternatives result in unique problems. Unique problems are present when there are truly unusual factors or when the costs or community disruption reach extraordinary magnitude.

When making a finding that an alternative is not feasible and prudent, it is not necessary to show that any single factor presents unique problems. Adverse factors such as environmental impacts, safety and geometric problems, decreased traffic service, increased costs, and any other factors may be considered collectively. A cumulation of problems such as these may be a sufficient reason to use a 4(f) property, but only if it creates truly unique problems.

In applying the standard of "unique problems", the nature, quality, and effect of the taking of the 4(f) property may be considered to show that there are truly unusual factors, or cost or community disruption of extraordinary magnitude. Thus the net impact of any build, no-build, or mitigation alternative on both the 4(f) property and the surrounding area or community must be considered. This may include the mitigation opportunities presented by an alternative (which uses some 4(f) property) that would reduce or eliminate the impact on the 4(f) property. Not all uses of 4(f) property have the same magnitude of effect and not all 4(f) properties being used have the same quality. For example, evaluation of net impact may consider whether the use of the 4(f) property involves (1) a large taking or a small taking (2) shaving an edge of its property or cutting through the middle, (3) altering part of the land surrounding an historic building or removing the building itself, or (4) an unused portion of a park or a highly used portion.

Care should be taken that consistent standards are applied throughout the length of any given project. For example, it would be inconsistent to accept a restricted roadway cross section (with a jersey barrier in the median or substandard width shoulders) for a highway over a drainage structure or for a bridge in order to reduce the project cost when at other locations on the same project (or similar projects) this roadway cross section is rejected as unacceptable in order to avoid a park.

The Section 4(f) evaluation must address the purpose and need of the project. This discussion must support the project termini and the types of alternatives, e.g., new location or modification of the existing alignment, that would satisfy the need for the project. That need must be sufficiently explained to show that the no-build alternative and any alternative that does not serve that need result in unique problems, i.e. truly unusual factors or cost or community disruption that reach extraordinary magnitude and are therefore not prudent and feasible. Theoretically there may be an unlimited number of alternatives that satisfy the need, but it is not necessary to examine all. The evaluation of alternatives must demonstrate a reasoned methodology for narrowing the field of alternatives to a number sufficient to support a sound judgment that the study of additional variations is not worthwhile.

If all the "build" alternatives use some Section 4(f) land, the alternative which has the least overall impact to Section 4(f) resources must be selected unless it is not feasible and prudent. For example, Table 1 shows the results of an analysis for two projects. On Project 1, Alternative D must be selected since it is feasible and prudent and does not use Section 4(f) land. On Project 2, Alternative B must be selected since (1) Alternative D, which avoids the Section 4(f) land is not feasible and prudent and (2) of the remaining alternatives that use Section 4(f) land, Alternative B has the least impact (after mitigation) on Section 4(f) land. The above analysis must be used when eliminating alternatives from further consideration regardless of when they are dropped in the project development process.

TABLE 1

Project	Alternative	Feasible and Prudent	Uses Section 4(f) Land	Harm to Section 4(f) Land (after mitigation)
1	A	Yes	Yes	Greatest
	B	Yes	Yes	Least
	C	Yes	Yes	Medium
	D	Yes	No	None
2	A	Yes	Yes	Greatest
	B	Yes	Yes	Least
	C	Yes	Yes	Medium
	D	No	No	None

If a project includes the demolition of a historic bridge, the following alternatives must have been considered and found not feasible and prudent:

1. Do nothing;
2. Build on new location without using the historic bridge; and
3. Rehabilitation without affecting the historic integrity of the bridge.

There have been many projects where it is feasible and prudent to build on new location but it is not feasible and prudent to preserve the existing bridge. This could occur (1) when the historic bridge is beyond rehabilitation for a transportation or an alternative use; (2) when no responsible party can be located, through a marketing effort, to maintain and preserve the historic features of the bridge; or (3) when a permitting authority, such as the Coast Guard, requires removal or demolition of the historic bridge.

Mitigation

The statute and the FHWA regulation require all possible planning to minimize harm. All possible planning to minimize harm (i.e., mitigation measures) should be determined through consultation with the official of the agency owning or administering the land. Note that neither the

Section 4(f) statute nor the FHWA Section 4(f) regulation require the replacement of Section 4(f) land used for highway projects. However, mitigation measures (other than design modifications in the project to lessen the impact on Section 4(f) land) involving parks, recreation areas, and wild-life and waterfowl refuges will usually entail replacement of land and facilities (of comparable value and function) or monetary compensation which could be used to enhance the remaining land. Mitigation of historic sites usually consist of those measures necessary to preserve the historic integrity of the site and agreed to, in accordance with 36 CFR, Part 800, by the FHWA, the State Historic Preservation Officer (SHPO), and, as appropriate, the Advisory Council on Historic Preservation (ACHP). The cost of mitigation should be a reasonable public expenditure in light of the severity of the impact on the Section 4(f) resource.

State and local governments often obtain grants through the Land and Water Conservation Fund Act to acquire or make improvements to parks and recreation areas. Section 6(f) of this Act prohibits the conversion of property acquired or developed with these grants to a nonrecreational purpose without the approval of the Department of the Interior's (DOI) National Park Service. Section 6(f) directs DOI to assure that replacement lands of equal value, location and usefulness are provided as conditions to such conversions. Consequently, where conversions of Section 6(f) lands are proposed for highway projects, replacement lands will be necessary. Regardless of the mitigation proposed, the Section 4(f) evaluation should document the National Park Service's tentative position relative to Section 6(f) conversion.

Coordination

Preliminary coordination prior to the circulation of the draft Section 4(f) evaluation should be accomplished with the official of the agency owning or administering the land, the DOI and, as appropriate, the Departments of Agriculture (USDA) and Housing and Urban Development (HUD). The preliminary coordination with DOI and HUD should be at the regional level. The preliminary coordination with USDA should be with the appropriate National Forest Supervisor. There should be coordination with USDA whenever a project uses land from the National Forest System. Since the Housing and Urban Rural Recovery Act of 1983 repealed the use restrictions for the Neighborhood Facilities Program authorized by Title VII of the HUD Act of 1965 and the Open Space Program authorized by Title VII of the Housing Act of 1961, the number of instances where coordination with HUD should be accomplished has been substantially reduced. Coordination with HUD should occur whenever a project uses Section 4(f) land for/on which HUD funding (other than the above) had been utilized.

If any issues are raised by these agencies resulting from the circulation of the draft Section 4(f) evaluation, followup coordination must be undertaken to resolve the issues. In most cases the agency's response will indicate a contact point for the followup coordination. However, case law indicates that if reasonable efforts to resolve the issues are not successful (one of these agencies is not satisfied with the way its concerns were addressed) and the issues were disclosed and received good-faith attention from the decisionmakers, we have met our procedural obligation under Section 4(f) to consult with and obtain the agency's comments. Section 4(f) does not require more.

Format and Approval

The Section 4(f) evaluation may be incorporated as an element of an environmental assessment/finding of no significant impact (EA/FONSI) or environmental impact statement (EIS). However, the Section 4(f) evaluation must be presented in a separate section. All Section 4(f) evaluations are approved at the Regional Office. If the Section 4(f) evaluation is contained in an EIS, the Region will make the Section 4(f) approval either in its approval of the final EIS or in the Record of Decision (ROD). In those cases where the Section 4(f) approval is made in the final EIS, the basis for the Section 4(f) approval will be summarized in the ROD.

Programmatic Section 4(f) Evaluations

As an alternative to preparing an individual Section 4(f) evaluation, FHWA may, in certain circumstances, have the option of applying a programmatic evaluation. Under a programmatic Section 4(f) evaluation, certain conditions are laid out such that, if a project meets the conditions, it will satisfy the requirements of Section 4(f) that there are no feasible and prudent alternatives and that there has been all possible planning to minimize harm. These conditions generally relate to the type of project, the severity of impacts to Section 4(f) property, the evaluation of alternatives, the establishment of a procedure for minimizing harm to the Section 4(f) property, and adequate coordination with appropriate entities. Programmatic Section 4(f) evaluations can be nationwide, regionwide, or statewide.

There are four nationwide programmatic Section 4(f) evaluations. One covers projects that use historic bridges. The second covers projects that use minor amounts of land from public parks, recreation areas and wildlife and waterfowl refuges. The third covers projects that use minor amounts of land from historic sites. The fourth covers bikeway projects.

The fact that the Nationwide programmatic Section 4(f) evaluations are approved does not mean that these types of projects are exempt from or have advance compliance with the requirements of Section 4(f). Section 4(f) does, in fact, apply to each of the types of projects addressed by the programmatic evaluations. Furthermore, the programmatic Section 4(f) does not relax the Section 4(f) standards; i.e., it is just as difficult to justify using Section 4(f) land with the programmatic Section 4(f) evaluation as it is with an individual Section 4(f) evaluation.

These programmatic Section 4(f) evaluations may be applied only to projects meeting the applicability criteria. How the project meets the applicability criteria must be documented. The documentation needed to support the conclusions required by the programmatic Section 4(f) evaluation would be comparable to the documentation needed for an individual Section 4(f) evaluation.

These programmatic Section 4(f) evaluations streamline the amount of interagency coordination that is required for an individual Section 4(f) evaluati .. Interagency coordination is required only with the official(s) with jurisdiction and not with DOI, USDA, or HUD (unless the Federal agency has a specific action to take, such as DOI approval of a conversion of land acquired using Land and Water Conservation Funds).

Section 4(f) Applicability

The following questions and answers provide guidance on the applicability of Section 4(f) to various types of land. The examples used describe the situations most often encountered. For advice on specific situations or issues not covered in this paper, contact the Regional Office or Washington Headquarters.

1. Use of Land

Question A:

What constitutes a "use" of land from a publicly owned public park, recreation area, wildlife refuge, and waterfowl refuge or historic site?

Answer A:

A "use" occurs (1) when land from a Section 4(f) site is acquired for a transportation project, (2) when there is an occupancy of land that is adverse in terms of the statute's preservationist purposes, or (3) when the proximity impacts of the transportation project on the Section 4(f) site, without acquisition of land, are so great that the purposes for which the Section 4(f) site exists are substantially impaired (normally referred to by courts as a constructive use).

The following types of work do not "use" land from a Section 4(f) site provided the historic qualities of the facility will not be adversely affected: (a) modification/rehabilitation of a historic highway; and (b) maintenance/rehabilitation of a historic bridge. Such determinations should be made only after the SHPO and the ACHP have been consulted and have not objected to the finding.

Question B:

Can a transportation project, located near or adjacent to a Section 4(f) site make a "constructive use" of that site even though there is no occupancy of the site by the project? How is "constructive use" determined?

Answer B:

Yes. A constructive use of a Section 4(f) site can occur when the capability to perform any of the site's vital functions is substantially impaired by the proximity impacts from a transportation project. Such substantial impairment would occur when the proximity impacts to Section 4(f) lands are sufficiently serious that the value of the site in terms of its prior significance and enjoyment are substantially reduced or los . The degree of impairment should be determined in consultation with the officials having jurisdiction over the resource. An example of such impact is excessive noise near an amphitheater. A November 12, 1985, memorandum (copy attached) from Mr. Ali F. Sevin,

Director of the Office of Environmental Policy to the Regional Federal Highway Administrators provides a process that can be used to determine whether there is a constructive use. The FHWA policy is that a constructive use of Section 4(f) lands is possible, but because of its rarity, it should be carefully examined. If it is concluded that the proximity effects do not cause a substantial impairment, the FHWA can reasonably conclude that there is no constructive use. Project documents should, of course, contain the analysis of proximity effects and whether there is substantial impairment to a Section 4(f) resource. Except for responding to review comments in environmental documents which specifically address constructive use, the term "constructive use" need not be used. Where it is decided that there will be a constructive use, the draft Section 4(f) evaluation must be cleared with the Washington Headquarters prior to circulation.

2. Public Parks, Recreation Areas, and Wildlife and Waterfowl Refuges

Question A:

When is pubicly owned land considered to be a park, recreation area or wildlife and waterfowl refuges? Who makes the decision?

Answer A:

Publicly owned land is considered to be a park, recreation area, or wildlife and waterfowl refuge when the land has been officially designated as such or when the Federal, State, or local officials having jurisdiction over the land determine that one of its major purposes or functions is for park, recreation, or refuge purposes. Incidental, secondary, occasional, or dispersed recreational activities do not constitute a major purpose. For the most part, the "officials having jurisdiction" are the officials of the agency owning or administering the land. There may be instances where the agency owning or administering the land has delegated or relinquished its authority to another agency, via an agreement on how some of its land will be used. The FHWA will review this agreement and determine which agency has authority on how the land will be used. If the authority has been delegated/relinquished to another agency, that agency must be contacted to determine the major purpose(s) of the land. After consultation and in the absence of an official designation of purpose or function by the officials having jurisdiction, the FHWA will base its decision on its own examination of the actual functions that exist.

The final decision on applicability of Section 4(f) to a particular type of land is made by FHWA. In reaching this decision, however, FHWA normally relies on the official having jurisdiction over the land to identify the kinds of activity or functions that take place.

Question B:

How should the significance of public parks, recreation areas, and waterfowl and wildlife re uges be determined?

Answer B:

"Significance" determinations (on publicly owned land considered to be park, recreation area, or wildlife and waterfowl refuge pursuant to Answer A above) are made by the Federal, State, or local officials having jurisdiction over the land. For the most part, the "officials having jurisdiction" are officials of the agency owning or administering the land. For certain types of Section 4(f) lands, more than one agency may have jurisdiction over the site. The significance determination must consider the significance of the entire property and not just the portion of the property being used for the project. The meaning of the term "significance" for purposes of Section 4(f) should be explained to the officials having jurisdiction. Significance means that in comparing the availability and function of the recreation, park, or wildlife and waterfowl refuge area with the recreational, park, and refuge objectives of that community, the land in question plays an important role in meeting those objectives. If a determination from the official with jurisdiction cannot be obtained, the Section 4(f) land will be presumed to be significant. All determinations (whether stated or presumed) are subject to review by FHWA for reasonableness.

Question C:

Are publicly owned parks and recreation areas which are significant, but not open to the public as a whole, subject to the requirements of Section 4(f)?

Answer C:

The requirements of Section 4(f) would apply if the entire public is permitted visitation at any time. Section 4(f) would not apply when visitation is permitted to only a select group and not the entire public. Examples of such groups include residents of a public housing project; military and their dependents; students of a school; and students, faculty, and alumni of a college or university. The FHWA does, however, strongly encourage the preservation of such parks and recreation areas even though they may not be open to the public at large.

Question D:

When does an easement or lease agreement with a governmental body constitute "public ownership?"

Answer D:

Case law holds that land subject to a public easement in perpetuity can be considered to be publicly owned land for the purpose which the easement exists. Under special circumstances, lease agreements may also constitute a proprietary interest in the land. Such lease agreements must be determined on a case-by-case basis, and such factors as the term of the lease, the understanding of the parties to the lease,

any cancellation clauses, and the like should be considered. Any questions on whether or not a leasehold or other temporary interest constitutes public ownership should be referred to the Washington Headquarters through the Regional Office.

3. Historic Sites

Question A:

How should the significance (for Section 4(f) purposes) of historic sites be determined?

Answer A:

Pursuant to the National Historic Preservation Act, the FHWA in cooperation with the State highway department consults with the SHPO and, if appropriate, with local officials to determine whether a site is on or eligible for the National Register of Historic Places. In case of doubt or disagreement between FHWA and the SHPO, a request for determination of eligibility is made to the Keeper of the National Register. A third party may also request the Keeper for a determination of eligibility. For purposes of Section 4(f), a historic site is significant only if it is on or eligible for the National Register of Historic Places, unless the FHWA determines that the application of Section 4(f) is otherwise appropriate. If a historic site is determined not to be on or eligible for the National Register of Historic Places, but an official (such as the Mayor, President of the local historic society, etc.) provides information to indicate that the historic site is of local significance, FHWA may apply Section 4(f). In the event that Section 4(f) is found inapplicable, the FHWA Division Office should document the basis for not applying Section 4(f). Such documentation might include the reasons why the historic site was not eligible for the National Register.

Question B:

How does Section 4(f) apply to either permanent or temporary occupancy of nonhistoric property within a historic district but not an integral part of the historical basis for designation of the district?

Answer B:

Normally, Section 4(f) does not apply where a property is not individually historic, is not an integral part of the historic district in which it is located, and does not contribute to the factors which make the district historic. The property and the district must be carefully evaluated to determine whether or not such a property could be occupied without adversely affecting the integrity of the historic district. If the occupancy of the property adversely affects the integrity of the district, then Section 4(f) would apply. Appropriate steps (including consultation with the SHPO) should be taken to establish and document that the property is not historic, that it has no value in the context of the historic district, and its occupancy would not adversely affect the integrity of the historic district.

Question C:

If a highway project does not occupy land in a historic site or district but does cause an "adverse effect" under 36 CFR 800, do the Section 4(f) requirements apply (i.e., is there a constructive use)?

Answer C:

An "adverse effect" under 36 CFR 800 does not automatically mean that Section 4(f) applies. If the impact would not substantially impair the historic integrity of a historic site or district, Section 4(f) requirements do not apply. Whether or not the historic integrity of the historic site or district is substantially impaired should be determined in consultation with the SHPO and thoroughly documented in the project records.

4. Historic Bridges and Highways

Question A:

How does Section 4(f) apply to historic bridges and highways?

Answer A:

The Section 4(f) statute places restrictions on the use of land from historic sites for highway improvements. The statute makes no mention of historic bridges or highways which are already serving as transportation facilities. The Congress clearly did not intend to restrict the rehabilitation, repair, or improvement of historic bridges and highways if the historic integrity is not adversely affected. The FHWA has, therefore, determined that Section 4(f) would apply if a historic bridge or highway is demolished or if its historic integrity (the criteria for which the bridge was designated historic) is adversely affected due to the proposed improvement. The affect on the historic integrity is determined in consultation with the SHPO. Section 4(f) does not apply to the construction of a replacement bridge when a historic bridge is left in place and the proximity impacts of the replacement bridge do not substantially impair the historic integrity of the historic bridge.

Question B:

How do the requirements of Section 4(f) apply to donations (pursuant to 23 U.S.C. 144(o)) to a State, locality, or responsible private entity?

Answer B

A Section 4(f) use exists when the donee cannot maintain the features that give the bridge its historic significance. In such cases the Section 4(f) evaluation would need to establish that it is not feasible and prudent to leave the historic bridge alone. If the bridge marketing effort is unsuccessful and the bridge is to be demolished, a finding would have to be made that there is no feasible and prudent alternative.

5. Archaeological Resources

Question A:

When does Section 4(f) apply to archaeological sites?

Answer A:

Section 4(f) applies to all archaeological sites on or eligible for inclusion on the National Register and which warrant preservation in place (including those discovered during construction). Section 4(f) does not apply if FHWA, after consultation with the SHPO and the ACHP, determines that the archaeological resource is important chiefly because of what can be learned by data recovery (even if it is agreed not to recover the resource) and has minimal value for preservation in place. For sites discovered during construction, where preservation of the resource in place is warranted, the Section 4(f) process will be expedited. In such cases, the evaluation of feasible and prudent alternatives will take account of the level of investment already made. The review process, including the consultation with other agencies, should be shortened, as appropriate. An October 19, 1980, memorandum (copy attached) with the Heritage Conservation and Recreation Service (now National Park Service) provides emergency procedures for unanticipated cultural resources discovered during construction.

Question B:

How should the Section 4(f) requirements be applied to archaeological districts?

Answer B:

Section 4(f) requirements apply to an archaeological district the same as they do to an archaeological site (only where preservation in place is warranted). However, as with historic districts, Section 4(f) would not apply if after consultation with the SHPO, FHWA determines that the project occupies only a part of the district which is a noncontributing part of that district provided such portion could be occupied without adversely affecting the integrity of the archaeological district. In addition, Section 4(f) would not apply if after consultation with the SHPO and the ACHP, it is determined that the project occupies only a part of the district which is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place, provided such portion could be occupied without adversely affecting the integrity of the archaeological district.

6. Public Multiple-use Land Holdings

Question:

Are multiple-use public land holdings (e.g., National Forests, State Forests, Bureau of Land Management lands, etc.) subject to the requirements of Section 4(f)?

Answer:

Section 4(f) applies to historic sites and only to those portions of lands which are designated by statute or identified in the management plans of the administering agency as being for park, recreation, or wildlife or waterfowl refuge purposes and which are determined to be significant for such purposes. For public land holdings which do not have management plans (or where existing management plans are not current) Section 4(f) applies to those areas which function primarily for Section 4(f) purposes. Section 4(f) does not apply to areas of multiple-use lands which function primarily for purposes not protected by Section 4(f).

7. Late Designation

Are properties in highway ownership that are designated (as park and recreation lands, wildlife and waterfowl refuges, and historic sites) late in the development of a proposed project subject to the requirements of Section 4(f)?

Answer:

Except for archaeological resources, a project may proceed without consideration under Section 4(f) if that land was purchased for transportation purposes prior to the designation or prior to a change in the determination of significance and if an adequate effort was made to identify properties protected by Section 4(f) prior to the acquisition. The adequacy of effort made to identify properties protected by Section 4(f) should consider the requirements, or the standards of adequacy, that existed at the time of search. Archaeological resources may be subject to the requirements of Section 4(f) in accordance with Question 5A.

8. Wild and Scenic Rivers

Question A:

Are rivers and adjoining lands under study (pursuant to Section 5(a) of the Wild and Scenic Rivers Act) as potential wild and scenic rivers subject to Section 4(f)?

Answer A:

No. However, publicly owned public parks, recreation areas, and refuges and historic sites in a potential river corridor would still be subject to Section 4(f).

Question B:

Are rivers which are included in the National Wild and Scenic Rivers System and the adjoining lands subject to Section 4(f)?

Answer B:

Publicly-owned waters of designated wild and scenic rivers are protected by Section 4(f). Publicly-owned lands in the immediate proximity of such rivers may be protected by Section 4(f) depending on the manner in which they are administered by the Federal, State, or local government which administers the land. Wild and scenic rivers are managed by different Federal agencies including the U.S. Forest Service, the National Park Service and the Fish and Wildlife Service. The FHWA should examine the management plan developed for the river (as required by the Wild and Scenic Rivers Act) to determine how the public lands adjacent to the rivers are administered. Section 4(f) would apply to those portions of the land designated in the management plan for recreation or other Section 4(f) activities. Where the management plan is not sufficiently specific, FHWA should consult further with the river manager and document the primary function of the area in order to make a Section 4(f) determination. Those areas that function primarily and/or are managed for recreational purposes are subject to Section 4(f).

9. Fairgrounds

Question:

Are publicly owned fairgrounds subject to the requirements of Section 4(f)?

Answer:

Section 4(f) is not applicable to publicly owned fairgrounds that function primarily for commercial purposes (e.g., stock car races, annual fairs, etc.), rather than recreation. When fairgrounds are open to the public and function primarily for public recreation other than an annual fair, Section 4(f) only applies to those portions of land determined significant for recreational purposes.

10. School Playgrounds

Question:

Are publicly owned school playgrounds subject to the requirements of Section 4(f)?

Answer:

While the primary purpose of school playgrounds is for structured physical education classes and recreation for students, such lands may also serve public recreational purposes and as such, may be subject to Section 4(f) requirements. When the playground serves only school activities and functions, the playground is not considered subject to Section 4(f). However, when the playground is open to the public and serves either organized or recreational purposes (walk-on activity), it is subject to the requirements of Section 4(f) if the playground is determined to be significant for recreational purposes (See Question 2B). In determining the significance of the playground facilities, there may

be more than one official having jurisdiction over the facility. A school official is considered to be the official having jurisdiction of the land during school activities. However, the school board may have authorized the city's park and recreation department or a public organization to control the facilities after school hours. The actual function of the playground is the determining factor under these circumstances. Therefore, documentation should be obtained from the official(s) having jurisdiction over the facility stating whether or not the playground is of local significance for recreational purposes.

11. Bodies of Water

Question:

How does the Section 4(f) apply to publicly owned lakes and rivers?

Answer:

Lakes are sometimes subject to multiple, even conflicting, activity and do not readily fit into one category or another. When lakes function for park, recreation, or refuge activities, Section 4(f) would only apply to those portions of water which function primarily for those purposes. Section 4(f) does not apply to areas which function primarily for other purposes. In general, rivers are not subject to the requirements of Section 4(f). Rivers in the National Wild and Scenic Rivers System are subject to the requirements of Section 4(f) in accordance with Questions 8A and 8B. Those portions of publicly owned rivers which are designated as recreational trails are subject to the requirements of Section 4(f). Of course, Section 4(f) would also apply to lakes and rivers or portions thereof which are contained within the boundaries of parks, recreational areas, refuges, and historic sites to which Section 4(f) otherwise applies.

12. Trails

Question A:

The National Trails System Act permits the designation of scenic and recreational trails. Are these trails or other designated scenic or recreational trails on publicly owned land subject to the requirements of Section 4(f)?

Answer A:

Yes, except for the Continental Divide National Scenic Trail which was exempted from Section 4(f) by Public Law 95-625.

Question B:

Are trails on privately owned land (including land under public easement) which are designated as scenic or recreational trails subject to the requirements of Section 4(f)?

Answer B:

Section 4(f) does not apply to trails on privately owned land unless there is a public easement to permit the public to utilize the trail. Nevertheless, every reasonable effort should be made to maintain the continuity of designated trails in the National System.

Question C:

Are trails on highway rights-of-way which are designated as scenic or recreational trails subject to the requirements of Section 4(f)?

Answer C:

If the trail is simply described as occupying the rights-of-way of the highway and is not limited to any specific location within the right-of-way, a "use" of land would not occur provided adjustments or changes in the alignment of the highway or the trail would not substantially impair the continuity of the trail. In this regard, it would be helpful if all future designations made under the National Trails System Act describe the location of the trail only as generally in the right-of-way.

Question D:

Are historic trails which are designated (pursuant to the National Trails System Act) as national historic trails (but not scenic or recreational) subject to the requirements of Section 4(f)?

Answer D:

Only lands or sites adjacent to historic trails which are on or eligible for the National Register of Historic Places are subject to Section 4(f). Otherwise (pursuant to Public Law 95-625), national historic trails are exempt from Section 4(f).

13. Bikeways

Question:

Do the requirements of Section 4(f) apply to bikeways?

Answer:

If the bikeway is primarily for transportation and is an integral part of the local transportation system, the requirements of Section 4(f) would not apply. Section 4(f) would apply to bikeways (or portions thereof) designated or functioning primarily for recreation unless the official having jurisdiction determines it not to be significant for such purpose. However, as with recreational trails, if the recreational bikeway is simply described as occupying the highway rights-of-way and is not limited to any specific location within that right-of-way, a "use" of land would not occur (Section 4(f) would not

apply) provided adjustments or changes in the alignment of the highway or bikeway would not substantially impair the continuity of the bikeway.

Regardless of whether Section 4(f) applies to a bikeway, Title 23, Section 109(n), precludes the approval of any project which will result in the severance or destruction of an existing major route for non-motorized transportation traffic unless such project provides a reasonably alternative route or such a route exists.

14. Joint Development (Park with Highway Corridor)

Question:

Where a public park or recreation area is planned on a publicly owned tract of land and a strip of land within the tract is reserved for a highway corridor at the time the development plan for the tract is established, do the requirements of Section 4(f) apply?

Answer:

The requirements of Section 4(f) do not apply to the subsequent highway construction on the reserved right-of-way as previously planned. All measures which were taken to jointly develop the highway and the park should be completely documented in the project records.

15. "Planned" Facilities

Question:

Do the requirements of Section 4(f) apply to publicly owned properties "planned" for park, recreation area, wildlife refuge, or waterfowl refuge purposes even though they are not presently functioning as such?

Answer:

Section 4(f) applies if the agency that owns the property has formally designated and determined it to be significant for park, recreation area, wildlife refuge, or waterfowl purposes.

16. Temporary Occupancy of Highway Right-of-Way

Question:

Is temporary occupancy of highway rights-of-way for park and recreational activity (e.g., a playground or snowmobile trail is allowed to be located on highway property) subject to the requirements of Section 4(f)?

Answer:

Section 4(f) does not apply to either authorized or unauthorized temporary occupancy of highway right-of-way pending further project development. For authorized temporary occupancy of highway rights-of-way for recreation, it would be advisable to make clear in a limited

occupancy permit with a reversionary clause that no right is created and the park or recreational activity is a temporary one pending completion of the highway project.

17. Tunneling

Question:

Is tunneling under a publicly owned public park, recreation area, wildlife refuge, and waterfowl refuge, or historic site subject to the requirements of Section 4(f)?

Answer:

Section 4(f) would apply only if the tunneling (1) will disturb any archaeological sites on or eligible for the National Register of Historic Places which warrant preservation in place, or (2) causes disruption which will harm the purposes for which the park, recreation, wildlife or waterfowl refuge was established or will adversely affect the historic integrity of the historic site.

18. Wildlife Management Areas

Question:

Do the requirements of Section 4(f) apply to Wildlife Management Areas?

Answer:

Section 4(f) may apply to publicly owned wildlife management areas (or any other wildlife area, e.g., Wildlife Reserve, Wildlife Preserve, Wildlife Sanctuary, Waterfowl Production Area, etc.), which are not a wildlife refuge but perform some of the same functions as a refuge. If a Federal, State, or local law clearly delineates a difference between Wildlife Refuges and Wildlife Management Areas, the intentional separation of these systems demonstrates that Section 4(f) should not apply to Wildlife Management Areas in the jurisdiction for which the law governs. If a Federal, State, or local law does not establish such a clear distinction, the property should be examined to determine its "refuge" characteristics. If the wildlife management area primarily functions as a sanctuary or refuge for the protection of species, Section 4(f) would apply.

Publicly owned wildlife management areas (or any other wildlife area, which is not a refuge or sanctuary) may allow recreation opportunities. The areas on which the recreation occurs may be subject to the requirements of Section 4(f) in accordance with Question 6.

19. Air Rights

Question:

Do the requirements of Section 4(f) apply to bridging over a publicly owned public park, recreation area, wildlife refuge, waterfowl refuge, or historic site?

Answer:

Section 4(f) applies if piers or other appurtenances are placed on the park, recreation, wildlife refuge or waterfowl refuge or historic site. Section 4(f) also applies if the bridge harms the purposes for which these lands were established or adversely affects the historic integrity of the historic site.

20. Access Ramps (in accord with Section 147)

Question:

Is the construction of access ramps (pursuant to Section 147 of the Federal-aid Highway Act of 1976, Public Law 94-280) to public boat launching areas located within a publicly owned public park, recreation area, wildlife refuge, or waterfowl refuge subject to the requirements of Section 4(f)?

Answer:

Section 147 provides for the construction of access ramps to public boat launching areas adjacent to bridges under construction, reconstruction, replacement, repair, or alteration on the Federal-aid primary, secondary, and urban system highways. Such access ramps are not an integral or necessary component of the bridge project (to which they are appended) which is approved by the FHWA nor do such access ramps meet any transportation need or provide any transportation benefits.

Where boat launching areas are located in publicly owned parks, recreational areas, or refuges otherwise protected by the provisions of Section 4(f), it would be contrary to the intent of Section 147 to search for "feasible and prudent alternatives" to the use of such areas as a site for a ramp to a boat launching area. A consistent reading of Section 147 and Section 4(f) precludes the simultaneous application of the two sections to boat launching ramp projects through or to the publicly owned park, recreation area or refuge with which the boat launching area is associated. Therefore, Section 4(f) does not apply to access ramp projects to such boat launching areas carried out pursuant to Section 147. However, the construction, replacement, repair, or alteration of a bridge on Section 4(f) land will be subject to Section 4(f).

21. Scenic Byways

Question:

How does Section 4(f) apply to scenic byways?

Answer:

The designation of a road as a scenic byway is not intended to create a park or recreation area within the meaning of 49 USC 303 or 23 USC 138. The improvement (reconstruction, rehabitation or relocation) of a publicly-owned scenic byway would not come under the purview of Section 4(f) unless the improvement were to otherwise use land from a protected resource.

JUN 7 1989

22. Temporary Construction Easements

Question:

How does Section 4(f) apply to temporary construction easements?

Answer:

Section 4(f) does not apply to a temporary occupancy (including those resulting from a right-of-entry, construction and other temporary easements and other short-term arrangements) of publicly-owned parks, recreation areas, wildlife or waterfowl refuges, or any historic site where there is documentation that the officials having jurisdiction over the protected resource agree that the temporary occupancy will:

(a) be of short duration and less than the time needed for construction of the project,

(b) not change the ownership or result in the retention of long-term or indefinite interests in the land for transportation purposes,

(c) not result in any temporary or permanent adverse change to the activities, features, or attributes which are important to the purposes or functions that qualify the resource for protection under Section 4(f), and

(d) include only a minor amount of land.

JUN 7 1989

US Department
of Transportation

Federal Highway Administration

Memorandum

Subject: Section 4(f) - Constructive Use

Date: NOV 12 1995

From: Director, Office of Environmental Policy
Washington, D.C. 20590

Reply to Attn of: HEV-11

To: Regional Federal Highway Administrators
Regions 1-10, and Direct Federal Program Administrator

Concern has been expressed from several State highway agencies and from several Federal Highway Administration (FHWA) offices about the results of litigation on constructive use of Section 4(f) lands. The two most notable cases are I-CARE in Fort Worth, Texas, and H-3 in Hawaii.

While each of these decisions represented major setbacks for the respective projects and may present formidable obstacles from the standpoint of nationwide precedent, we believe that FHWA can construct a defensible position on the proper application of the constructive use doctrine on future projects.

The first step in the defense is a recognition that a constructive use can occur. The second step is to establish a threshold or standard for determining when the constructive use occurs. The FHWA has determined that the threshold for constructive use is proximity impacts which substantially impair the function of a park, recreation area, or waterfowl or wildlife refuge, or substantially impair the historic integrity of a historic site.

Steps 3, 4, and 5 are project specific and should be applied whenever there is a likelihood that constructive use could occur or will be an issue on a project. The third step is to identify the functions, activities, and qualities of the Section 4(f) resource which may be sensitive to proximity impacts. The fourth step is to analyze the proximity impacts on the Section 4(f) resource. Impacts (such as noise, water runoff, etc.) which can be quantified, should be quantified. Other proximity impacts (such as visual intrusion) which lend themselves to qualitative analysis should be qualified. The fifth step is to determine whether these impacts substantially impair the function of the Section 4(f) resource or the historic integrity of a historic site. This determination on impairment should, of course, be coordinated with the public agency which owns the park, recreation area, or refuge, or with the State Historic Preservation Officer in the case of historic sites.

If it is concluded that the proximity effects do not cause a substantial impairment, the FHWA can reasonably conclude that there is no constructive use. Project documents should, of course, contain the analysis of proximity effects and whether there is substantial impairment to a Section 4(f) resource. Except for responding to review comments in environmental documents which specifically address constructive use, the term "constructive use" need not be used. Where it is decided that there will be a constructive use, the draft Section 4(f) evaluation must be cleared with the Washington Headquarters prior to circulation.

Ali F. Sevin

OCT 19 1980

MEMORANDUM OF UNDERSTANDING BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION AND THE HERITAGE CONSERVATION AND RECREATION SERVICE CONCERNING EMERGENCY PROCEDURES APPLICABLE TO UNANTICIPATED CULTURAL RESOURCES DISCOVERED DURING CONSTRUCTION OF FEDERAL-AID HIGHWAYS

WHEREAS, the United States Department of Transportation, Federal Highway Administration (FHWA), is authorized and directed by Congress to implement the Federal-aid highway program (Title 23, U.S.C.); and

WHEREAS, a delay to the project could unnecessarily disrupt a construction schedule and be costly; and

WHEREAS, representatives of the FHWA, the National Conference of State Historic Preservation Officers, the Heritage Conservation and Recreation Service (HCRS), and the Advisory Council on Historic Preservation (ACHP) have met to consider FHWA responsibilities when such emergency conditions exist; and

WHEREAS, these parties agree that a special procedure is necessary and appropriate to allow expeditious consideration of such resources and meet the requirements of 36 CFR, Part 800.7;

THEREFORE, it is mutually agreed that the stipulations in this Memorandum of Understanding provide an expeditious alternate method for consideration of cultural resources which are discovered after construction has started.

STIPULATIONS

I. When a Federal-aid highway construction project uncovers a cultural resource that may be eligible for the National Register, the expeditious process detailed in Stipulation II may be adopted if the following has been accomplished:

   A. A cultural resource survey performed according to the requirements of 36 CFR, Part 800.4(a), was completed prior to project approval and the discovered resource was not identified during such survey.

   B. The process detailed in the ACHP regulations (36 CFR, Part 800) was completed prior to the start of construction.

   C. The construction contract directs the contractor to be on the lookout for cultural resources and to avoid damage to such discovered resources until the provisions of Stipulation II are complied with.

II. Whenever anything that might be a cultural resource is discovered during construction, work will avoid the area of the discovery and the contractor shall notify the State highway agency (SHA) immediately. If warranted, the SHA will contact and inform the State Historic Preservation Officer (SHPO) and FHWA of the discovery and arrange an onsite meeting of appropriate parties if either FHWA or the SHPO believes it necessary. If it is determined that a meeting will be held, the following actions will be taken:

A. The FHWA will notify the HCRS, Division of Interagency Archeological Services (IAS), Department of the Interior (DOI), by telephone with followup written notification that it appears that significant archeological or historical data contained in a cultural resource have been uncovered on a particular project.

B. Within 48 hours of telephone notification, HCRS will send an authorized representative of the Secretary of the Interior (DOI representative) to examine the discovery.

C. Following examination and consultation with the SHPO, SHA, FHWA, and any local authorities deemed appropriate, one of the following recommendations will be made at the onsite meeting by the DOI representative. If the DOI representative does not attend the scheduled field review, FHWA may proceed with what it considers to be an appropriate course of action. The SHA and SHPO representatives may also make one of these recommendations if they so choose.

1. The data discovered are significant and should be preserved in place; or

2. The data discovered are significant and should be recovered; or

3. The data discovered are significant but no additional data recovery need be undertaken; or

4. The data discovered are not significant and no data recovery need be undertaken.

5. There is insufficient information to determine if the data discovered are significant and the necessary steps to obtain the needed information to reach one of the definite conclusions stated above will be recommended.

D. In consultation with the DOI representative, the SHPO, SHA, and appropriate local authorities, FHWA will decide the appropriate course of action in proceeding with the project. When data recovery is the appropriate option, the onsite meeting will determine what steps should be taken to recover the significant data, including development of data recovery plan.

III. This understanding may be terminated by any of the signatories upon a 60-day notification to all other signatories.

Administrator, Federal Highway Administration

SEP 2 3 1980
Date

Director, Heritage Conservation Recreation Service

10·1·80
Date

Concurring Party

President, National Conference of State Historic Preservation Officers

10/28/80
Date

Attachment 2

Differences Between the FHWA and DOI Positions

Constructive Use

The Department of the Interior (DOI) stated they might consider the following as examples of constructive use: (1) where the proximity of a highway alters a habitat area in a wildlife refuge or interferes with the normal behavior of wildlife populations; (2) where a highway reduces the current level of access to a park or recreation area; and (3) where a highway changes the character of the view from a historic district that is incompatible with the historic nature of the district. The DOI's description of the threshold for constructive use of Section 4(f) resources contains terms such as alters, interferes, reduces and changes. We agree that these types of impacts where they are sufficiently severe to substantially impair the resource would be a constructive use. However, standing alone, the Federal Highway Administration (FHWA) views these terms as establishing a lower threshold than those generally found in case law. A number of court decisions, including Adler v. Lewis, 675 F.2d 1085 (9th Cir. 1982) (copy enclosed), have established "substantial impairment" as the threshold for constructive use.

Wild and Scenic Rivers - The DOI stated that (1) all rivers now in the National Wild and Scenic Rivers System have been designated because of recreational and park (conservation, etc.) values, (2) all publicly owned lands within those boundaries are used for Section 4(f) purposes, (3) the management plans will show that the primary use is, in accord with the Wild and Scenic Rivers Act, for one or more Section 4(f) purposes, and (4) the officials having jurisdiction will, in all cases, certify that this is so if asked. The FHWA does not necessarily base application of Section 4(f) on titles or systems designation. Instead, FHWA bases Section 4(f) application on actual function. If portions of the publicly owned lands are designated for or function primarily for recreational purposes, then those portions would be subject to Section 4(f). We do not believe that publicly owned lands designated only for conservation values are recreational areas subject to Section 4(f).

Wildlife Management Areas (WMA) - The DOI stated that Federal WMAs are part of the National Wildlife Refuge System and therefore are considered to be a refuge within the meaning of Section 4(f). We have revised the discussion on wildlife management areas to state that such areas would be protected by Section 4(f) where they perform the same functions as a refuge, i.e. protection of species. As explained in answer 2A we would, of course, rely heavily on the views of the officials having jurisdiction over these areas in determining their function.

Historic Sites - The DOI wants to afford Section 4(f) protection to historic sites even if they are not on or eligible for the National Register of Historic Places. Obviously we cannot afford Section 4(f) protection to every

site which is claimed historic by any individual. It has been a longstanding DOT Policy to apply Section 4(f) to all sites on or eligible for the National Register. In addition, our environmental regulation and this policy paper extend Section 4(f) protection to other historic sites based on an individual site-by-site review.

Archeological Sites - The DOI wants to afford Section 4(f) protection to archeological sites even if they are important chiefly because of what can be learned by data recovery and have minimal value for preservation in place. This position is contrary to our regulation which was upheld in the Belmont case (Town of Belmont v. Dole, 755 F.2d 28 (1st Cir., 1985)).